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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 969

NATIONWIDE TRAILER RENTAL SYSTEM, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed on the ground that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment entered by the district court on February 7, 1956 (J. St. 13a), adjudging that appellants had combined and conspired to restrain interstate commerce in one-way trailer rentals, in violation of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 1. The complaint was filed in August 1953. After a

trial at which the evidence consisted of more than 350 exhibits and extensive oral testimony (reported in over 575 pages of transcript), the court, in July, 1955, filed its findings of fact and conclusions of law (J. St. 1a–12a). Following entry of final judgment in February 1956, the defendants filed timely motions to amend the findings and judgment. Both parties elaborately briefed and orally argued the questions raised by these motions, which the court denied on January 7, 1957 (J. St. 20a–21a).

The defendants against whom judgment was entered, the present appellants, are Nationwide Trailer Rental System, Inc. (NTRS), a non-profit Michigan corporation, and George A. Croft, Sr., and A. E. Simon, who at the time of the filing of the complaint were, respectively, the president and the secretary-treasurer of NTRS.

The members of NTRS are companies, partnerships, or individuals engaged in the one-way trailer rental business. Trailers so employed are hitched to and hauled by ordinary passenger automobiles and are used to transport household goods and personal effects. These trailers are rented for a trip from one city to another under a rental contract which obligates the lessee to deliver the trailer to a designated "station" in or near the lessee's destination. The receiving station then arranges, as soon as it can, to rent the trailer for a trip to any other city which has an NTRS station. This process is repeated many times, so that a trailer moves from one place to another without intermediate return to the trailer owner. (Fng. 4, J. St. 2a.)

NTRS is composed of Class A and Class B members, each of which must have one NTRS station. Class A members are those who have ten or more trailers in active use in NTRS, and Class B members those who have less than ten such trailers. B members require the approval of NTRS's board of directors to put ten or more trailers into the system and restrictions are imposed as to the time when a change from B to A status can be made. Every "A" member may have, in addition to its own station, subsidiary NTRS rental stations, which are designated Class C stations. There is no limit on the number of C stations which an "A" member may have, but a C station cannot be established except by authority of NTRS's board of directors. "A" members are alone entitled to vote at membership meetings. (Fng. 17, J. St. 7a–8a.)

At the time of trial, NTRS had 168 Class A members, 63 Class B members, and 524 Class C stations. There were thus more than 750 NTRS stations, located in 46 states and the District of Columbia. (Fng. 27, J. St. 10a).

Under the rental instructions issued by NTRS, a station which receives the trailer of a member, rents it on the first opportunity, collects the amount of the rental, retains 47½%, and transmits the remaining 52½% to the trailer owner.[1] The station sends a

[1] The owner sends 5% of the rental charge to NTRS (Art. VII, Sec. 1 of by-laws, Ex. 303). Accordingly, apart from the 5% which goes to NTRS, rentals are divided equally between the renting station and the trailer owner. The station also has certain duties of inspecting and servicing the trailers which it receives and rents (Ex. 57).

copy of the rental contract to the owner and to the NTRS station in the lessee's destination city. When the trailer is delivered to the latter station, it is required to notify both the owner and NTRS. Under this system the trailer owner is advised at all times as to the whereabouts or use of each of his trailers. (Ex. 57.)

All NTRS stations use and are required to use the uniform rental contract adopted by NTRS. The contract specifies the time within which the trailer is to be delivered to the station in the destination city, which delivery time varies with the distance involved, and specifies the amount to be charged for overtime. (Fngs. 21–22, J. St. 9a; Ex. 303.)

NTRS also furnishes its member stations with what is designated an "Approximate Mileage Rate Schedule", together with a map of the United States zoned for each NTRS station (each zone being approximately 135 miles), so that a station can readily determine the number of zones involved for a movement from any one station to any other. The schedule sets forth a designated rate for each of the 55 zones and for each of eighteen sizes of "open" and "van" trailers. The schedule states that the rates set forth "are only approximate and are left entirely to the discretion of the renting operator", and that they may be varied up or down, "especially where the competition is great or business is very seasonal." The members did not strictly adhere to the price list, did not agree to adhere to it, and were not punished for deviation, but they agreed to circulate the price

list and they used it as a guide in determining rentals. (Fngs. 23–24, J. St. 9a–10a; Ex. 57.)

The by-laws prohibit a member from being connected with a competitive one-way trailer system (Fng. 15, J. St. 5a), and the rental instructions permit a station to rent a NTRS trailer only for delivery to another NTRS station (Ex. 57). If the trailer of a non-member comes into any station, it "shall only be rented back to its owner," in which case the station sends a third of the rental to NTRS (Ex 57, Rental Instructions, Oct. 11, 1954, p. 2). The receiving station keeps half the rental and thus only a sixth of the rental is left for the non-member trailer owner.

The by-laws protect each NTRS station against the competition of another NTRS station within the area served by the existing station. Article IV, Section 3, of the by-laws states (Fng. 15, J. St. 5a–6a):

> A member shall be protected from any [membership] application within his city or immediate vicinity as long as there are no official complaints against him. Unless the member consents, in writing, it shall be the duty of the secretary to deny such applications.

Thus no new station can be established within the protected area of an existing station, except with the latter's consent.

At the time of the trial there were more than 30,000 trailers employed in the United States in the one-way rental business, more than one third of which were NTRS trailers circulating exclusively in its system (Fng. 26, J. St. 10a). In the calendar year

1954, the gross receipts from rentals of NTRS trailers were approximately $2,800,000 (Ex. 304). The gross rentals of U-Haul, the chief competitor of NTRS, were about $1,545,000 in 1953, and its 1954 receipts were estimated to be $2,500,000 (Tr. 920–921).

The court concluded that appellants had engaged in illegal price fixing, (1) by agreeing upon the amount to be charged for overtime, and (2) by adopting and circulating a rate schedule, which action, "while not fixing a rigid price, was such a tampering with prices as is forbidden by the Sherman Act." The court also concluded that appellants had violated the Sherman Act by establishing "exclusive territories for each member" and empowering each member "to prevent any other operator from becoming a member in his area." (J. St. 12a.)

The judgment which was entered prohibits appellants from participating in any plan which requires or suggests that operators of trailer rental stations follow a schedule or suggested schedule of rental rates. It also enjoins them from establishing or allocating "exclusive territories" for such operators, and from preventing any person from carrying on this business at the place of his choosing. In addition, it requires NTRS to admit to membership any one-way trailer operator, provided the applicant agrees to meet his financial obligations and maintain adequate safety standards for one-way trailers. (Judgment, pars. V–VI; J. St. 15a–16a.)

ARGUMENT

The first question raised by appellants is whether the court erred in concluding that they had engaged

in an illegal price fixing scheme (J. St. 3, 9–11). However, the facts amply support the court's conclusion. The NTRS members adopted a uniform lease contract (Fng. 21, J. St. 9a), and the amount to be charged for overtime was a printed part of this contract (Fng. 22, J. St. 9a). While appellants contend that the court did not affirmatively find that the NTRS members used this uniform rate (J. St. 9), finding 22 explicitly embraces the allegedly missing determination. Finding 22 reads in full:

> The current lease form contains a lease agreement *which is used by all operators,* who are members of NTRS. Also, printed on the lease form itself and a part of each leasing contract is a provision for overtime charge and the amount which will be charged therefor. There was no evidence that any operators did not use this lease form. It is supplied to the operators free of charge by NTRS. [Emphasis added.]

We also submit that there was illegal price fixing, under established criteria, when NTRS furnished to all its members a schedule of suggested rental rates, set forth so as to supply a specific rate for each of 18 trailer classifications for each possible movement from one NTRS station to another. At the very least, this schedule provided the price norm, and it necessarily exerted a stabilizing or pegging influence on price. This is manifest by the circular letter of May 10, 1954, from NTRS to all of its members (Ex. 57). The circular stated that those who rent one-way trailers are always on the lookout for a bargain and that the members cannot "hope to beat our competition" if they "hold trailers for high rentals"; and

that NTRS is preparing a zone rate schedule which will place the suggested rates "on a par with our competitors". The circular then declared: "Until this suggested rate schedule is furnished, all members are urged to take the initiative to meet the price demands existing in the various cities and areas." The fact that NTRS urged its members to depart from the rate schedule when necessary to meet competitive rates shows that NTRS itself believed that the scheduled rates were those which normally would be charged.

"Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*" *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223. "And the fact that no penalties are imposed for deviations from the price schedules is not material. * * * Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line." *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 489. See also, *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 62–63.

Appellants' reliance upon *Maple Flooring Manufacturers' Ass'n* v. *United States*, 268 U. S. 563 (J. St. 10–11), is, we submit, misplaced. What was there circulated was general information about average production costs, freight rates, and past sales and prices. This Court emphasized that the statistics disseminated "do not include current price quotations", and that all reports of sales and prices "dealt

exclusively with past and closed transactions" (*id.* at 573–574). In contrast, the present appellants adopted and circulated suggested prices for *future* rentals.

2. The second question presented by appellants is whether they illegally restrained trade by the rules and regulations which they adopted governing admission of members and establishment of new NTRS stations (J. St. 3, 11–12). The agreement not to permit a new station within the area served by an existing station eliminates competition among members of NTRS in rental of one-way trailers. The agreement to prevent such competition has all the elements of an agreement to allocate trade areas and markets. This Court has consistently held that agreements to allocate or divide markets are illegal *per se*. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 596–599; *United States* v. *National Lead Co.*, 63 F. Supp. 513 (S. D. N. Y.), affirmed, 332 U. S. 319; *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497; *United States* v. *American Tobacco Co.*, 221 U. S. 106, 182; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241.

We finally note that the judgment requirement that any duly qualified applicant shall be admitted to membership in NTRS has direct precedent in the relief decreed in an antitrust proceeding against a membership corporation, and approved by this Court. *Associated Press* v. *United States*, 326 U. S. 1, 21.

CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

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